

DOCUMENT RESUME

03617 - [A2593717]

[Protest against Rejection of Bid as Nonresponsive]. B-169682.
September 15, 1977. 6 pp.

Decision re: Test Drilling Service Co.; by Robert F. Keller,
Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Department of the Army: Corps of
Engineers.

Authority: 52 Comp. Gen. 389. 55 Comp. Gen. 1352. 39 Comp. Gen.
249. E-181828 (1974). B-183155 (1975). B-181042 (1974).
E-176206 (1972). E-187338 (1977). B-185712 (1976).

The protester objected to the rejection of its bid as nonresponsive. The agency's specifications prohibiting the use of certain well casings was reasonable because it was based on previous adverse experience and the prohibition was a material requirement of the invitation for bids. Information submitted with the bid in response to the "method of operation" provision was considered to qualify the bid even though the provision was intended to obtain data for the purpose of determining bidder responsibility. (Author/SC)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-189682

DATE: September 15, 1977

MATTER OF: Test Drilling Service Co.

DIGEST:

1. Although certain well casings used in construction of dams did not become part of end item, agency's specifications prohibiting use of such well casings was reasonable when based on previous adverse experience and the prohibition was material requirement of IFB.
2. Where information submitted with bid in response to "method of operation" provision indicates proposed use of equipment or material prohibited by IFB, bidder, in effect, has qualified bid even though "method of operation" provision was intended to obtain data for purpose of determining bidder responsibility.

Test Drilling Service Company (Test Drilling) protests the award of a contract to anyone other than itself under invitation for bids (IFB) No. DACW 38-77-B-0064 which was issued by the Corps of Engineers, U.S. Army (Army). Test Drilling contends that it is the low, responsive and responsible bidder and that the Army was in error in rejecting its bid as nonresponsive.

The procurement was restricted to small businesses and called for bids for the construction of 136 relief wells at the Granada Dam in Mississippi. Paragraph 2-5.4 of the specifications provided as follows:

"2-5.4 Well Casing Length and Diameter. All open-end well casing used in the construction of this well system shall be furnished by the Contractor and shall remain the property of the Contractor. The casing shall be made up in one continuous piece with an outside diameter of 18 inches and a minimum wall thickness of 1/2 inch. The casing shall be straight and

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true and withstand driving to the required depths. The use of spiral-weld casing will not be allowed."

Where the IFB required the bidder to submit its "method of operations", Test Drilling inserted the following paragraph:

"Casing will be driven continuously without voluntary interruption until required depth is attained. Temporary casing will be 18-in. and 20-in. X 0.375-in. wall spiral-weld or seamless steel pipe with reinforcing rings top and bottom as recommended by LB Foster Co."

During a pre-award survey of Test Drilling after the bid opening, the Army concluded that Test Drilling's proposed use of 0.375 spiral weld or seamless steel pipe with an outside diameter of 18 and 20 inches was a material deviation from the specifications which required 0.50 inch pipe with an outside diameter of 18 inches and which specifically prohibited the use of spiral weld casings. On July 11, 1977, the Army sent Test Drilling a notice of bid rejection due to nonresponsiveness and on the same date awarded a contract to the next low bidder. Test Drilling protested to this Office on July 22, 1977 on the grounds that the deviations related to the responsibility of the bidder and not to the responsiveness of the bid. A notice to proceed with the work was sent to the next low bidder on August 3, 1977 due to the urgency of the project.

Test Drilling asserts that even if the "method of operation" provision were construed as relating to responsiveness, the variance in the information submitted is not material and may not properly be the basis for rejecting its bids. Test Drilling states that the difference in the cost of the 0.50 inch casing and the 0.375 inch casing amounts to about two hundred dollars which is much less than the difference between its price and that of the next highest bidder. Thus, it states that the error does not go to the substance of the bid in terms of price, quality, quantity or delivery and that correction of the

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error would not prejudice the rights of the next highest bidder. Although Test Drilling also states that it made a clerical error in referring to casings of 0.375 inch thickness, the Army asserts that Test Drilling, when given the opportunity, was unable to prove by reliable evidence that such a mistake occurred. In any event, if the bid must be viewed as nonresponsive it could not be corrected to become responsive.

Test Drilling asserts that the IFB solicited bids for the construction of the relief wells and not for the purpose of acquiring equipment as such or of requiring the contractor to adhere to a rigid method of operations which allow no deviations. Test Drilling points out that the well casings do not become part of the end product delivered under the contract but are used and removed during the construction. It concedes that the agency has a legitimate interest in assuring that the specifications are met but states that it cannot properly require a contractor to utilize only one method of performance in meeting the specifications, citing Nationwide Building Maintenance, Inc., 52 Comp. Gen. 389 (1972).

We agree that the removable well casings were not part of the deliverable end item but we do not agree that the agency is precluded from specifying the type and dimensions of the well casings if it has a reasonable basis for so doing. While we consider the Nationwide case applicable in the instant case to the extent that the "method of operations" provision is required to show bidder responsibility, we believe it is not relevant to the question as to what an agency can require in its basic specifications. It is well settled that the determination of the needs and the methods of accommodating them are properly the responsibility of the contracting agencies which are best able to draft appropriate specifications. Maremont Corporation, 55 Comp. Gen. 1362, (1976), 76-2 CPD 181. It is proper for an agency to determine its needs based on its actual experience, engineering analysis, logic or similar rational basis. Bowers Reporting Company, B-185712, August 10, 1976, 76-2 CPD 144. Though the specifications must be drawn so as to maximize competition, this Office will not substitute its judgment for that of the contracting agency unless

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it is shown by clear and convincing evidence that the agency's judgment is in error and that a contract awarded on the basis of such specifications would, by unduly restricting competition, be in violation of law. Key-stone Diesel Engine Company, Inc., B-187338, February 23, 1977, 77-1 CPD 128.

The Army states that it experienced difficulties with well casings on a recent similar project and that it deliberately drafted the specifications for this project with a view toward avoiding a repetition of such problems with their delays and additional costs. During the previous project, spiral weld wall casings had failed at the seams and some fatigue was found in the casings which were thinner than 0.50 inch. The use of 18 inch diameter well casings was specified to avoid difficulty in drawing and extracting. The Army states that the use of 20 inch diameter casing would require larger volumes of filter material and modification to the centralizers used in the installation of each well, both of which will be furnished by the Government. We believe that the Army's adverse prior experience with the well casings prohibited in this IFB provided a reasonable basis for such prohibition and that the prohibition constituted a material requirement of the IFB.

Test Drilling further contends that the "method of operation" provision in the IFB, when construed in the light of previous decisions of this Office, relates to the responsibility of the bidder and not to the responsiveness of the bid. It states that the provision does not relate to the bidder's legal obligation to perform in accordance with the terms of the contract but to its capacity and ability to perform. Test Drilling asserts that a failure to submit such data does not render the bid nonresponsive and that the bidder's responsibility unlike the bid's responsiveness, can be determined on the basis of information submitted after bid opening.

There is no indication in the IFB as to the purpose or necessity of the "method of operations" provision. It provides only 2 1/2 inches of space and states that if sketches are attached, it should be so stated. However, the contracting officer's statement in response to this protest concedes that the provision was included as an aid to the determination of responsibility. This Office

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has frequently held that information required for the determination of responsibility may be submitted after bid opening. 39 Comp. Gen. 247 (1959). Thus, it appears clear that if Test Drilling had left blank the "method of operations" space, it would have been responsive and any information required could have been submitted after bid opening.

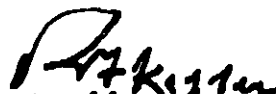
Test Drilling did not, however, leave blank the "method of operations" space but inserted information indicating the intended use of well casings prohibited in the basic specifications. The Army contends that this conditioned the bid and provided Test Drilling with the option of complying or not complying with the specification. As qualified, Test Drilling's bid did not constitute an unequivocal offer to perform as specified which could be accepted without clarification from the bidder. The Army further contends that clear language inserted in the "method of operations" provision when read with the conflicting requirement of the specification rendered the entire bid ambiguous and nonresponsive. In essence, it contends that the "method of operations" provision, which was included for responsibility purposes, can affect the responsiveness of a bid if the information inserted therein conflicts with the clear requirements of the specifications.

In our opinion, a bidder cannot be permitted, under the cover of a "method of operations" provision, to insert information in conflict with the specifications without the risk of having its bid declared nonresponsive. The purpose of the provision in this IFB was to determine how the bidder proposed to perform the work within the specifications. It was not intended to permit the bidder to change the specifications. Test Drilling cites the following cases to support its position that information submitted for purposes of determining responsibility cannot be used to determine if a bid is responsive. BOW Industries, Incorporated, B-181828, December 12, 1974, 74-2 CPD 330; Western Waterproofing Company, Inc., B-182155, May 20, 1975, 75-1 CPD 306; Starr Electric Company, B-181042, August 2, 1974, 74-2 CPD 75; Nation-wide Building Maintenance, Inc., B-176206, December 21, 1972. The information submitted in these cases, however, did not conflict with the specifications and did not

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involve an attempt to use data requested for the determination of responsibility as a means of modifying the specifications.

Accordingly, this protest is denied.


Deputy Comptroller General
of the United States